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No. 95 -

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

NATIONAL ASSOCIATION OF
REVERSIONARY PROPERTY OWNERS,
PETITIONER,

V.

INTERSTATE COMMERCE COMMISSION AND
THE UNITED STATES OF AMERICA,
RESPONDENTS.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the Interstate Commerce Commission, consistent with the Due Process Clause, refuse to adopt any rules that would provide landowners notice and an opportunity for a hearing prior to depriving them of their constitutionally-protected property rights?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, the National Association of Reversionary Property Owners, an organization which represents over 100 property owners who own reversionary rights to railroad easements that are subject to or could be subjected to trail use in accord with 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. The respondents before the United States Court of Appeals for the District of Columbia Circuit were the Interstate Commerce Commission[1] and the United States of America.

Pursuant to Supreme Court Rule 29.6, petitioner states that it does not have any parent or subsidiary companies.

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1. The Interstate Commerce Commission was abolished as of January 1, 1996 pursuant to the ICC Termination Act of 1995. Pub. L. No. 104-88, §§ 2 & 101, 109 Stat. 803 (Dec. 29, 1995). The Surface Transportation Board now regulates the Rails-to-Trails program. Pub. L. No. 104-88, § 317, 109 Stat. 803. For simplicity's sake, however, NARPO will continue to refer to the ICC as the government regulator of the program.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner National Association of Reversionary Property Owners respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-titled case on November 3, 1995.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the District of Columbia Circuit is cited at 70 F.3d 638 (D.C. Cir. 1995) (table) and is reprinted in the Appendix ("A.") 1-10, infra.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered November 3, 1995, is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 16 U.S.C. § 1247(d) which provides, in material part, as follows:

> If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of [recreational trails, formerly used as railroad lines] . . . and for any legal liability arising out of such transfer or use, and for payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

Section 8(d) of the National Trails Act Amendments of 1983, Pub. L. No. 98-11, tit. II, §208, 97 Stat. 48.

This action also involves the Fifth Amendment to the U.S. Constitution which provides that "[n]o person shall . . . be deprived of . . . property, without due process of law."

STATEMENT OF THE CASE

Preliminary Statement

In passing the National Trails Act Amendments of 1983, Congress created a mechanism for converting old

railroad lines into running and cycling trails. The law has spawned numerous trails across the country. Runners and cyclists have new places to exercise; trail operators get a large piece of land at a low, or sometimes, at no cost; and even realtors benefit because they can tout a new long, desirable public park to prospective buyers. With such euphoria, who should complain? The answer is simple. The people who should complain are landowners whose reversionary right to the land under those trails is being taken without due process of law. This case explains their silence. The Interstate Commerce Commission ("ICC") refuses to safeguard those landowners' constitutional right to notice before that deprivation.

Current ICC rules governing rail-to-trail conversions deprive reversionary holders of their due process rights. Below the ICC argued that mere, undecipherable Federal Register notice is sufficient to protect these admittedly important constitutionally-protected property rights. Even though the Court of Appeals "doubt[ed]" that such notice passes constitutional muster, it ruled against the National Association of Reversionary Property Owners ("NARPO") on different, unsupportable grounds. A.10 n.6.

Statement of Facts and Prior Proceedings

Nineteenth century America saw great railroad expansion. At the time, companies typically acquired rights-of-way through purchasing easements for railroad purposes, rather than buying the land in fee. Upon termination of railroad service, reversionary holders, under state law, generally regained exclusive use, possession and control of this property. See National Wildlife Federation v. ICC, (hereinafter "NWF v. ICC"), 850 F.2d 694, 702-04 (D.C. Cir. 1988); Penn Central Corp. v. U.S. Railroad Vest Corp., 955 F.2d 1158, 1159 (7th Cir. 1992).

Statutory History

The law changed in 1920. Since then, ICC approval has been required before a railroad can abandon its obligation to provide rail service on a line. The Transportation Act of 1920, Title IV, Ch. 91, § 402, 41 Stat. 474, preempted the state common law of abandonment of railroad easements.[2] See NWF v. ICC, 850 F.2d at 703-04. The ICC grants an order authorizing abandonment of the railroad service obligation if "present or future public convenience and necessity require or permit the abandonment." 49 U.S.C. § 10903(a). Because a railroad cannot provide service on a line if it loses possession of the railroad easement, an easement cannot be abandoned until the ICC approves abandonment of the service obligation. See Preseault v. ICC, 494 U.S. 1, 10-11 (1990). The 1920 Act also preempted the jurisdiction of state courts to determine questions of abandonment of railroad easements as long as those easements were subject to ICC jurisdiction. See Trustees of the Diocese of Vermont v. State, 496 A.2d 151, 154 (Vt. 1985).

In 1968, Congress enacted the first version of the Trails Act to create a national system of public recreational trails. Pub. L. No. 90-543, 82 Stat. 919 (codified as amended at 16 U.S.C. §§ 1241 et seq.). It provided for acquisition of land for trail use by agreements with landowners by purchase, or, in limited circumstances, by condemnation. 16 U.S.C. § 1246 (e), (g). There was no provision for conversion of abandoned railroad rights-of-way to trail use.

In the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976, Pub. L. 94-210, 90 Stat. 146, § 809,

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2. The original version of the Interstate Commerce Act did not give the ICC jurisdiction over abandonment of railroad lines. Hayfield Northern Railroad Co. v. Chicago & North Western Transp. Co., 467 U.S. 622, 628 (1984); see Act of Feb. 4, 1887, Ch. 104, 24 Stat. 379.

codified at 49 U.S.C. § 10906, Congress provided that whenever the ICC finds that public convenience and necessity permit abandonment of service on a rail line, it should then consider whether the rail line is suitable for other public purposes, including recreation. If so, the ICC may delay the railroad company's disposition of the property for up to 180 days after an abandonment order unless the property had first been offered for sale for public purposes.

Prior to 1983, if the ICC found that there was no further public need for rail service on a rail line and therefore authorized a railroad to abandon its service on that rail line, and the railroad actually ceased using the property for railroad purposes, then the ICC also generally abandoned its own jurisdiction.[3] Hayfield Northern R. Co., 467 U.S. at 633-34; Preseault v. ICC, 494 U.S. at 5 n.3. There was no need for an agency regulating railroads to retain jurisdiction over land no longer used by railroads. Once the ICC no longer had preemptive jurisdiction, state law came back into operation. Consolidated Rail Corp. v. ICC, 29 F.3d 706, 709 (D.C. Cir. 1994). Because the right-of-way was no longer used for railroad purposes, the railroad easement then terminated under state law and the underlying fee owner was entitled to full use and possession of his land. NWF v. ICC, 850 F.2d at 703-04. This prevented would-be trail operators from converting the abandoned railroad right-of-way into a trail because the right-of-way no longer existed. See id. at 701 (noting ICC's statement that prior law did not preempt state law reversions upon cessation of rail service).

In 1983 Congress enacted the Trails Act, 16 U.S.C. § 1247(d). The statute blocks reversions by preserving the ICC's exclusive jurisdiction and preempting state law even after all railroad use ceases. The result is that the reversion

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3. This is still true under the present law if no one offers to operate a recreational trail on the right-of-way to be abandoned.

is prevented or indefinitely postponed while the land is opened to the general public as a recreational trail. Such use could continue forever. Alternatively, at least in theory, the right-of-way someday might be re-converted to railroad use. However, in either case, the reversionary holder is denied the current use and possession of his land which he would have had but for the operation of the federal law. He must wait for a hypothetical future day when no one will want to walk, cycle, skate, or drive a train across his land. Then he must wait longer until the trail operator is willing to formally return to him what, for practical purposes, has become a long, thin public park.

Thus, while state common law still generally governs termination of railroad easements and reversions to owners of the fee that power has been preempted by the ICC's "exclusive and plenary jurisdiction" to regulate abandonments. Preseault v. ICC, 494 U.S. at 8; Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (1981).

Regulatory History

The crucial point for this case is that under present ICC regulations, reversionary holders are not specifically notified of the possible adverse effects that a proposed trail conversion may have on their property rights. Nor do they have a right to be heard about whether the government should convert their property to public use.

A railroad that wishes to abandon service on a rail line must seek the permission of the ICC. 49 U.S.C. § 10903; 49 C.F.R. Part 1152. The ICC requires railroads seeking abandonment to mail notices of the proposed abandonment to thirteen classes of persons, including all "significant users" of the line, 49 C.F.R. § 1152.20(a)(2). Reversionary holders -- the people who actually own the land

that will be most affected by the abandonment -- are not on the ICC's list of persons entitled to notice.

The form of the notice is specified in the regulations and takes up approximately three columns of extra-fine print in the Code of Federal Regulations. 49 C.F.R. § 1152.21. The right-of-way is described in terms of railroad mileposts and railroad stations, a description that is likely to be incomprehensible to anyone who is not holding a railroad map in his hand as he reads the notice. In the middle of the lengthy notice is a line inviting comments on, among other things, "[p]rospective use of the right-of-way for interim trail use and rail banking." 49 C.F.R. § 1152.21. The ICC requires the railroad to run the notice as an advertisement in a local newspaper. Id. at § 1152.20(4). Copies of the notice are also posted in some railroad stations on the line to be abandoned. Id. at § 1152.20(3).

The railroad must also file a formal application for abandonment with the ICC, disclosing, among other things, whether "the applicant is aware of any restriction on the title to the property, including any reversionary interest, which would affect the transfer of title or the use of property for other than rail purposes." Id. at § 1152.22(e)(5). However, the railroad is not obliged to notify the owners of the very reversionary interests it discloses. It merely has to make a copy of the application available at some of the train stations on the line that is to be abandoned.[4]

If the ICC approves the abandonment, it publishes a notice in the Federal Register which, among other things, invites applications for possible trail use. 49 C.F.R. § 1152.27(b). Any governmental body or private organization can then file a comment or petition asking for a trail

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4. In many cases the railroad is seeking ex post authorization for cessation of service that happened years earlier. See 49 C.F.R. § 1152.50. In such cases, of course, there are no train stations on the line.

conversion. Id. at § 1152.29(a). The application must include a map and accurate description of the right-of-way. Id. at § 1152.29(a)(1). The would-be trail operator must promise to assume financial responsibility for converting and operating the right-of-way as a trail. Id. at § 1152.29(2) and (3). The ICC then makes a formal determination as to whether the Trails Act is applicable and whether the would-be trail operator meets statutory and regulatory standards of financial responsibility. Id. at 1152.29(b)(1).

A railroad can refuse to negotiate a trail agreement. If it refuses, the ICC immediately grants it a certificate of abandonment. Id. A railroad that owns the right-of-way in fee then can convert it to another use. The ICC believes that to force a railroad to agree to a conversion would take the railroad's property. See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 596 (1986); NWF v. ICC, 850 F.2d at 698. The Commission's refusal to force railroads to convert rights-of-way to trails has been upheld by the District of Columbia, Second and Ninth Circuits. NWF v. ICC, 850 F.2d at 702; Washington State Dept. of Game v. ICC, 829 F.2d 877, 882 (9th Cir. 1987); Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 483 (2d Cir. 1988).

If a railroad is willing to convert the right-of-way to trail use, then the ICC generally issues a Certificate of Interim Trail Use or Abandonment ("CITU"). However, if the railroad has already actually ceased rail service on a line and is asking the ICC to retroactively approve the cessation by granting an "exemption" of a route from ICC regulation, then the ICC will issue a Notice of Interim Trail Use or Abandonment ("NITU"). See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d at 628-30; 49 C.F.R. § 1152.29; 49 C.F.R. § 1152.50. A CITU or a NITU provides 180 days during which the railroad may negotiate an agreement for trail use with a qualified trail operator. If the

railroad and trail operator reach agreement, then the trail is automatically authorized by the CITU or NITU with no further action by the ICC. If the railroad and the would-be operator do not agree, then the CITU or NITU automatically converts into an effective certificate of abandonment of the rail service obligation and ICC jurisdiction ceases. 49 C.F.R. § 1152.29(c) & (d); Preseault v. ICC, 494 U.S. at 7 n.5; NWF v. ICC, 850 F.2d at 704.

Negotiations between the railroad and the would-be trail operator are private. Reversionary holders have no opportunity to be heard or to assert their rights. Indeed, the entire affair is so private that no one even tells the ICC itself the results of the negotiations. The ICC has a policy of "don't ask and don't tell." Its rules do not require anyone to notify it whether a trail is created or not. The ICC keeps no records of whether the rail line has been converted to trail use or totally abandoned. Thus, it does not know what land is still subject to its exclusive jurisdiction and what is not.

Even if a reversionary holder happens to become aware that a proposed trail conversion might adversely affect his property, under current ICC policy he has no right to participate or to learn what is happening in the negotiations. Under these rules, the first news that a reversionary owner may get of a trail may be the appearance of runners jogging across his land.

NARPO's Petition

As a result of the ICC's current regulatory scheme, reversionary holders such as NARPO members have been unable to effectively represent their interests before the ICC authorized the conversions. Consistent with the ICC's current regulations, NARPO members were not sent prior written notification of the proposed trail conversions on their land. A.12. NARPO members are concerned that they and other

reversionary holders around the country may suffer deprivations of their property rights in future trail conversions.

In 1989 NARPO first attempted to prevent the deprivation of its members' property rights by filing a rulemaking petition with the ICC. NARPO asked the ICC to amend its rules to provide reversionary interests owners with post-deprivation notice. The ICC denied the petition and NARPO did not appeal. A.6 n.3 & 8.

Five years later, on March 29, 1994, NARPO filed a new petition for rulemaking with the ICC. A.11-28. In that petition, NARPO asked the ICC to amend its rules, 49 C.F.R. § 1152.29, to require that whenever a prospective trail operator files an application seeking a trail conversion, that operator, or the railroad abandoning the right-of-way, must first notify abutting owners who may claim to own reversionary interests in the right-of-way. This pre-deprivation notice should describe, in plain language, the right-of-way and inform owners that their property interests may be affected by the proposed conversion. NARPO proposed that the notice should tell owners how and where they can give the ICC comments concerning the conversion. If substantive issues are raised by the comments, reversionary holders should be given an opportunity for a hearing on whether the proposed conversion meets the statutory standards. The notice should also inform the owners that they may have a claim against the United States if the conversion occurs. Even though a single rail-to-trail conversion may, in the ICC's words, affect thousands of landowners, NARPO only asked for one hearing per conversion, not a hearing for each property owner along a right-of-way.

On July 27, 1994, the ICC denied NARPO's petition. A.29-31. The ICC opined that there was no need to amend its rules because notices published in the Federal Register and

local newspapers give reversionary holders sufficient warning prior to a conversion. A.30. Moreover, said the ICC, its "implementation of the Trails Act is merely ministerial." Id. The ICC argued that the remedy for a reversionary holder who does not like a proposed trail conversion is to wait until the conversion happens and then to sue the United States in the Claims Court for just compensation for the taking of his property. A.30-31. NARPO filed a timely appeal of that order to the U.S. Court of Appeals for the D.C. Circuit.[5] A.32-33. The D.C. Circuit invoked jurisdiction pursuant to 28 U.S.C. §§ 2321, 2342 and 49 U.S.C. § 10326. A.6 n.3.

The D.C. Circuit denied NARPO's petition for review on November 3, 1995. The court held that it was "not necessary" to decide NARPO's constitutional claims for two reasons. A.7-8. First, the court found that petitioner has "other methods of challenging the constitutionality of the ICC's actions." A.8. Second, the court concluded that NARPO "does not allege that the order under review violates any constitutional right;" rather, the court stated that NARPO "alleges that the consequence of the ICC order is that current allegedly unconstitutional procedures will remain in place." Id.

SUMMARY OF ARGUMENT

Reversionary interests are constitutionally-protected property interests. Rail-to-trail conversions either take, or at the very least, severely and adversely impact these property interests sufficiently to trigger landowners' pre-deprivation due process rights. Before a rail line is converted to a

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5. Both NARPO and the ICC construed the 1994 petition to be a new request to initiate rulemaking, not a mere reopening of the 1989 proceeding. A.6 n.3. The D.C. Circuit also treated the petition as a request for new rules. Id.

recreational trail, therefore, reversionary holders are entitled to notice and a hearing.

The three-part test announced in Mathews v. Eldridge, 424 U.S. 319, 335 (1976) and its progeny has been used by this Court to determine what process is due. First, reversionary holders' important property rights are seriously impacted by ICC rules. Practically speaking, these landowners do not receive any notice prior to a rail-to-trail conversion. Second, the risk of erroneously depriving reversionary holders of their property interests could be significantly reduced by notice and hearing. Third, these additional procedures could be provided at a low or no additional cost to the government.

The ICC claimed that it is immaterial whether or not reversionary holders receive prior notice because it simply rubber stamps rail-to-trail conversions. This claim, however, belies the significant powers that the ICC admitted it has and the statutory mandates of the Trails Act. Additional procedures would provide the ICC with crucial information, ensuring that prospective trail operators met statutory requirements.

REASONS FOR GRANTING THE WRIT

This Court has held that two questions must be answered in order to determine whether and to what extent a reversionary holder is entitled to pre-deprivation procedures. First, have regulations deprived landowners of constitutionally-protected property interests? Second, if there was such deprivation, what process is due? Mathews v. Eldridge, 424 U.S. at 332, 335.

I. RAIL-TO-TRAIL CONVERSIONS DEPRIVE REVERSIONARY HOLDERS OF CONSTITUTIONALLY-PROTECTED PROPERTY INTERESTS.

A. *Reversionary Interests Are Constitutionally-Protected Property Interests.*

Reversionary interests are property rights, entitled to constitutional protection. This Court acknowledged that at least "some rail-to-trail conversions will amount to takings." Preseault v. ICC, 494 U.S. at 16. The Claims Court held that a "reversionary interest constitutes property within the meaning of the fifth amendment." Preseault v. United States, 27 Fed.Cl. 69, 87 (1992). Accord Preseault v. United States, 24 Cl.Ct. 818, 831 (1992). Even the ICC conceded in this and other D.C. Circuit cases that "a reversionary interest in land is 'property' within the meaning of the fifth amendment." NWF v. ICC, 955 F.2d at 704.

B. *Rail-to-Trail Conversions Deprive Reversionary Holders of Property Interests.*

Rail-to-trail conversions deprive reversionary holders of their property rights by either (1) taking their property or (2) adversely impacting their property interests so severely that, even in the absence of a compensable taking, their due process rights are triggered.

1. Rail-to-Trail Conversions Take Property.

Converting a rail line to a recreational trail deprives reversionary holders of their constitutionally-protected property interests by either temporarily or permanently taking

their property.[6] In adopting 16 U.S.C. § 1247(d), "Congress prevented property interests from reverting under state law." Preseault, 494 U.S. at 8. This Court held, and the ICC has repeatedly admitted, that "rail-to-trail conversions giving rise to just compensation claims are clearly authorized by § 8(d) [§ 1247(d)]." Id. at 13. See also id. at 22 (O'Connor, J., concurring) ("[t]he Commission's actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights.").

Congress and the ICC have consistently asserted that the Trails Act and the subsequent rules were created to prevent reversionary interests from vesting under state law. H.R. Rep. No. 28, 98th Cong., 1st Sess. 2 at 8-9, reprinted in 1983 U.S. CODE CONG. & ADMIN. NEWS, 112, 119-120 ("H. Rep. 98-28") ("The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. . . . The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use."); Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d at 597-98, 597, 599, 600 (rules codified at 49 C.F.R. §§ 1152.21, 1152.25, 1152.29, 1152.50, 1105.11) ("the main

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6. NARPO mentions a possible takings claim only for purposes of securing constitutionally-mandated due process. NARPO does not seek to litigate, at this time, whether rail-to-trail conversions actually take property and require just compensation. The takings issue is currently being litigated, en banc, before the United States Court of Appeals for the Federal Circuit. Preseault v. United States, Nos. 93-5067, 93-5068. As a point of clarification, the Federal Circuit decision, 66 F.3d 1167 (Fed. Cir. 1995), cited by the D.C. Circuit, A.4, has been withdrawn. See Order of Nov. 20, 1995. A.34.

purpose of [§ 1247(d)] is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreation use when the rights-of-way have been operated under easements for railroad purposes."). See also Preseault, 27 Fed. Cl. at 90 ("[i]t is undisputed that the sole purpose in enacting section 1247(d) was to frustrate the reversionary interest of owners of the fee underlying railroad easements, which interest would become present possessory the instant the ICC certified abandonment under the 4-R Act.").

2. Rail-to-Trail Conversions Adversely Impact Property Interests To At Least Trigger Due Process Safeguards.

Even if a rail-to-trail conversion does not rise to the level of a compensable taking, it adversely impacts property interests sufficient to trigger due process safeguards. This Court has repeatedly held that even temporary impairments of property rights implicate the Due Process Clause. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (interests in unsecured claims); Connecticut v. Doehr, 501 U.S. 1 (1991) (attachments or liens).

In Connecticut v. Doehr, a state law that authorized prejudgment ex parte attachment of realty violated the Due Process Clause. The state argued that the prejudgment attachment law was constitutional because it neither physically occupied nor completely destroyed the economic use of the property. This Court, however, had "never held that only such extreme deprivations trigger due process concern. . . . [E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." 501 U.S. at 12. See also Fuentes v. Shevin, 407 U.S. 67, 86 (1972) (constitutional definition of "property" has

"been read broadly to extend protection to 'any significant property interest'" such as a temporary loss of possession); Penn Central, 955 F.2d at 1162 (state law -- that rights-of-way automatically vested to abutters upon a finding by the ICC that a railroad line was abandoned -- violated the Constitution because "the requirement of due process, including a pre-deprivation hearing where feasible, applies to temporary as well as to permanent deprivations.").

In short, when the ICC approves a trail conversion, property interests are either taken or sufficiently adversely impacted so that due process is required. The next step is to determine what process is due. "Determining the effects of trail use on existing property interests . . . is necessarily a case specific process." NWF v. ICC, 850 F.2d at 706. NARPO believes that this case specific process requires reasonable notice and an opportunity to be heard prior to any conversion.

II. THE DUE PROCESS CLAUSE REQUIRES THAT THE ICC PROVIDE REVERSIONARY HOLDERS REASONABLE NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE IT AUTHORIZES PUBLIC TRAIL USE OF THEIR LAND.

The three-prong test announced in Mathews v. Eldridge, 424 U.S. at 335, and recently restated in United States v. James Daniel Good Real Property, 510 U.S. ___, 126 L.Ed.2d 490, 503 (1993), determines what process is due.

> The Mathews analysis requires us to consider [1] the private interest affected by the official action; [2] the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and [3] the Government's interest, including the administrative burden that

additional procedural requirements would impose.

Id.,126 L.Ed.2d at 503.

A. *Reversionary Holders' Property Interests Are Significantly Affected by the Application of ICC Rules.*

Rail-to-trail conversions significantly impact reversionary holders' property interests. The impact can be seen on both micro and macro levels.

On a micro level, railroad rights-of-way run through reversionary interest holders' front yards, farms, gardens and outdoor sanctuaries. For example, the aforementioned, seemingly endless, Preseault litigation concerns Paul and Patricia Preseault's lakefront home and yard. Being able to enjoy their land and the view of Lake Champlain in quiet anonymity was an invaluable part of their life. However, since the construction of the recreational trail across their land, Paul and Pat must share not only their right-of-way, which passes within thirty feet of their front door, with hundreds of runners and cyclists, but they also must contend with many of these same people trespassing on their yard. The trail is not well marked and many people veer off it and onto the Preseaults' yard in order to obtain a better view of the scenic lake. Moreover, the Preseaults, who must cross the right-of-way to get to and from their home, have nearly and have actually collided with several trail users.

On a macro scale, numerous landowners are affected by the Rail-to-Trail rules. The ICC conceded, in the D.C. Circuit, that an individual rail conversion could potentially affect thousands of landowners' important property interests. However, in the same breath, the ICC steadfastly refused to protect such interests by promulgating even the most

rudimentary procedural safeguards.

On both the macro and the micro levels, therefore, the first Mathews criterion weighs in NARPO's favor.

B. *Current ICC Rules Create a Great Risk of Erroneous Deprivation of Property Interests.*

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. This Court emphasized that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id. at 315.

The notice now provided under ICC rules is likely unseen by any reversionary holders. And, if such notice is actually seen, it is not likely to be understood by anyone other than an expert in railroad law.

The ICC claimed below that it is irrelevant whether it continues to give ineffective notice or changes its rules to provide reasonable notice. Notice is irrelevant, the ICC argued, because it lacks the power to stop rail-to-trail conversions. NARPO believes that the ICC should not be allowed to claim that it has the pedestrian foibles of a Clark Kent, while secretly possessing Superman-like powers.

Under the Trails Act, the ICC is empowered and required to determine whether a trail operator meets the statutory requirements of the Act. If the operator does not, the ICC must deny the conversion application. To make that determination, the ICC must investigate the facts surrounding each conversion. Additional procedures, which would notify reversionary holders prior to a conversion, would have significant value to the ICC and those landholders who would

be ensured that each trail operator meets the statutory requirements.

1. Current Notice

Current ICC rules provide for Federal Register and local newspaper notice. Reversionary holders are not likely to see such notice.[7]

The D.C. Circuit itself "doubt[ed] that Federal Register notice alone would support the ICC's conclusion that most reversionary interest owners [were] thereby on notice." A.10 n.6. NARPO agrees.

Newspaper notice is similarly ineffective. "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper." Mullane, 339 U.S. at 315.

Not only are both Federal Register and newspaper notices in small type, they are practically incomprehensible by all except a railroad lawyer who is reading the notice in one hand while holding a detailed map of the rail line in the other.[8] The notice currently required by ICC rules, therefore,

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7. The ICC also mentioned tangential ways that the public receives notice of rail-to-trail conversions. The ICC contended, without factual support, that "local publicity generated by a proposed trial [sic] conversion notifies reversionary interest owners." A.9. Publicity or gossip overheard in the local barber, beauty or coffee shop does not sufficiently protect reversionary holders' constitutional rights. Barber shop notice is not due process.

8. A railroad that intends to abandon a right-of-way must provide notice that states in part:

> (Name of Applicant) gives notice that on or about (insert date application will be filed with the Commission) it intends to file with the Interstate Commerce Commission,

is not reasonably calculated to inform farmers, ranchers and homeowners about rail-to-trail conversions.

2. ICC Powers

The ICC has repeatedly claimed that its own role in rail-to-trail conversions is strictly "ministerial," and that therefore reversionary holders have "little to gain" from actually knowing about any conversion before the fact. A.8-9. In reality, however, the ICC has significant powers.

> Washington, D.C. 20423, an application for a certificate permitting the abandonment of (the discontinuance of service on), a line of railroad known as extending from railroad milepost near (station name) to (the end of line or rail milepost) near (station name), a distance of miles, in County(ies), State(s). The line for which the abandonment (or discontinuance) application will be filed includes the stations of (list all stations on the line in order of milepost number, indicating milepost location).
>
> . . .
>
> Any interested person, after the application is filed on (insert date), is entitled to file with the Interstate Commerce Commission written comments concerning the proposed abandonment (or discontinuance) or protests to it.
>
> . . .
>
> In addition, a commenting party or protestant may provide a statement of position and a summary of evidence regarding:
>
> . . .
>
> (vi) Prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and § 1152.29.

49 C.F.R. § 1152.21.

In order to save paper, NARPO has reproduced only the highlights. The entire text fills three columns in the Code of Federal Regulations. The sole reference to trail use is buried in the middle. Id.

The ICC admitted that prior to a conversion, it can rule that a trail offer is subterfuge, i.e., that the right-of-way will not be used as a trail; or that the trail operator will not meet the statutory requirements, i.e., the operator lacks the funding required to meet the financial and liability conditions of the Trails Act. See 16 U.S.C. § 1247(d) (trail operator must be "prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for payment of any and all taxes that may be levied or assessed against such rights-of-way."); Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 156 (1987); Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990).

Even after a trail agreement has been negotiated, the ICC conceded that it has the power to determine whether the trail operator has the ability to meet the financial and liability conditions. See Missouri Pacific Railroad Co. -- Aband. In Okmulgee, Okfuskee, Hughes, Pontotoc, Cal, Johnston, Atoka, and Bryan Counties, OK, Slip. Op. at 3-4 (1990), A.39-41. If the operator does not meet these conditions, the ICC can deem the line abandoned and the rights-of-way automatically revert to the reversionary holders.

3. Probable Value of Additional Procedures

Additional procedures would have significant value because they would likely inform reversionary holders prior to rail-to-trail conversions. Clearly, these landowners will have the incentive to investigate the facts surrounding a proposed trail and convey these facts to the ICC. "Determining the effects of trail use on existing property interests . . . is necessarily a case specific process." NWF v. ICC, 850 F.2d at 706. For example, a proposed fenced trail could keep cattle from their water source or an unfenced trail

could make likely livestock and trail user collisions.

In some states, moreover, tort liability may extend to foreseeable wrongful acts of trail invitees. Reversionary holders may also be jointly and severally liable for injuries suffered on the trail because they continue to be the fee owners of the trail. In today's litigious society trail collisions could easily result in a complex suit among the injured trail user, the trail operator and the abutting landowner. Proper responsibility for maintenance of the trail for the recreational pleasure of the public is sensibly read to include building and maintaining the trail in a way that reduces to a reasonable minimum the risk of injury to users and abutting landowners.

There also will be factual issues as to whether the would-be trail operator will have the financial ability to assume the liabilities and costs of the trail. While the ICC might reasonably presume that a State would have the requisite ability, there is no reason to presume that every municipality and private organization could afford to do the job properly.

In each proposed trail conversion there also will be a factual question as to whether the proposal will properly accomplish Congress' other purpose: preserving the right of way in a condition that will make reconversion to railroad use possible. This is not merely a matter of making sure that nothing will be built on the trail that cannot be removed later. More importantly, it is a matter of making sure that enough of the right-of-way is preserved so that rail use will be possible. As this Court stated in Preseault v. ICC, "Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable." 494 U.S. at 19. However, there is a crucial difference between "not foreseeable" and "not possible." If the trail operator preserves only a small slice out of the middle of a long right-

of-way, then future railroad use will become impossible because no one will ever be able to make economic use out of a railway beginning and ending in the middle of nowhere. A proposal that would preserve only a short segment of a right-of-way would frustrate the statutory intent and misuse § 1247(d). As the Seventh Circuit pointed out in Penn Central, 955 F.2d at 1160, disconnected pieces of a right-of-way are economically useless as a transportation corridor and should be returned to the abutting owners.

Currently, the ICC is administering the Rails-to-Trails program with its eyes closed. The Commission is primarily in the business of regulating railroads and other carriers. It obviously has little hope that abandoned rail lines will ever really be restored to rail use and it prefers to spend its scarce resources regulating the remaining railroads rather than reviewing plans for creating and maintaining skinny public parks.

The ICC has taken its laissez-faire attitude to the point where it cannot tell whether the statutory criteria of § 1247(d) will be met in any given conversion. Indeed, because the ICC does not even require the trail operator and railroad to report whether their negotiations have been successful, the ICC does not even know whether a conversion has occurred. Therefore, it cannot tell what land is still subject to its jurisdiction and what portions of the right-of-way, if any, have been preserved for future rail use. It fails to check whether would-be trail operators have the financial ability to assume the responsibilities that § 1247(d) requires of operators. Even one ICC commissioner warned that, "[i]n the absence of formal or actual notification that a Trails Act deal was in the making, a reversionary owner could suddenly discover that decisions affecting vital ownership interests were finalized before the owner could attempt to show that statutory criteria were not met." Rail Abandonments--Use of Rights of-Way as Trails--Supplemental Trails Act Procedures,

Ex Parte No. 274 (Sub-No. 13), 1989 WL 238631, at 6 (ICC 1989) (Andre, C., dissenting). Under the ICC's current procedures there is a substantial risk of an erroneous decision as to whether the statutory criteria will be satisfied. Therefore, the second of the Mathews criteria also weighs in NARPO's favor.

C. *The Cost of Additional Procedures is Small.*

In the court below, the ICC claimed that actual notice would be "expensive." A.9. Since most owners of reversionary interests abut the rail line, NARPO suggested that a trail operator or a railroad could "hire a high school student with a bicycle to ride down the line placing a notice in each landowner's mailbox." A.10. Even this minimalist, low cost method of actual notice would likely provide a majority of reversionary holders with notice of an impending rail-to-trail conversion. This proposed method would have minimal if any additional cost to the government.

Another possible low cost suggestion centers around the railroad map system and/or town records. The ICC conceded that the map system, statutorily required by 49 U.S.C. §§ 10781 et seq., has not been enforced since the 1950's. However, violation of a regulatory agency's statutory duty should not and does not justify a constitutional violation. If the ICC kept its map system up to date, notice to reversionary holders would take little additional effort.

Even incomplete or old maps are another place for the railroad or trail operator to begin the process of notifying reversionary holders of a rail-to-trail conversion. The ICC admitted that the maps show the boundaries of the railroad property, from whom the property was acquired, the type of deed and to whom the property was sold. The subsequent chain of title that might not be included in the maps could easily be discovered through a search of town property

records.

Finally, if the comments made by reversionary holders, as a result of receiving notice of a conversion, raise substantive issues regarding a trail operator, the ICC should, consistent with the Due Process Clause, hold a hearing. The ICC need only hold one hearing per conversion, not one hearing for each reversionary holder.

The essential point here is that there are clearly low cost ways of providing greater notice and at least some kind of hearing before landowners' rights are taken; the ICC simply refused to consider them. Thus, the third Mathews criteria also favors NARPO.

III. THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION BELIES CLEAR PRECEDENT AND COMMON SENSE.

The D.C. Circuit did not fully address NARPO's constitutional claim. The court provided two reasons. First, the court stated that "both NARPO and its members have other methods of challenging the constitutionality of the ICC's actions." A.8. Second, the court suggested that NARPO does not ask for review of any "agency action." A.7-8.

A. *NARPO's Other Possible Remedy Is Irrelevant Here.*

The D.C. Circuit stated that individual reversionary holders "can seek review of constitutional claims after an ICC order approves a trail conversion." A.8. The D.C. Circuit's apparent reference was to a takings action in the Claims Court. Requiring reliance on any such remedy, however, ignores the clear language of the Fifth Amendment. That amendment speaks of both Takings and Due Process. A court cannot simply create a Hobson's Choice for reversionary holders, i.e., giving them a choice of potential just

compensation or nothing. The proper question before the D.C. Circuit was whether NARPO and its members had stated a valid Due Process claim not whether they could subsequently pursue a takings claim.[9]

It is clear that reversionary holders are harmed by a lack of reasonable notice and hearing prior to a rail-to-trail conversion. Post-deprivation remedies are insufficient to protect that right to due process. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." Fuentes, 407 U.S. at 81. This Court held in Fuentes that even after a person's property is returned to him and damages are paid at a subsequent hearing, "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Id. at 82 (internal quotation marks omitted).

The ICC's failure to amend its rules to provide pre-deprivation notice and hearing to reversionary holders apparently conflicts with the law of the Seventh Circuit. See Penn Central, 955 F.2d 1158. Indiana enacted a law that provided that whenever the ICC abandoned jurisdiction over

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9. In the D.C. Circuit's per curiam, unpublished opinion, the court stated that "factors such as the number of reversionary interest owners already on notice and the cost of requiring actual notice would not differ depending on the timing of the notice." A.10. While this statement is probably true, it fails to sufficiently analyze NARPO's due process claim. The D.C. Circuit may very well be correct that the same number of reversionary holders are in the dark prior to and right after ICC authorization of a rail-to-trail conversion and the low cost of providing notice holds true at both points in time. However, this statement is not a satisfactory analysis of the three-pronged test announced in Mathews v. Eldridge.

a right-of-way, it would be deemed abandoned under state law and automatically transfer to the abutter. This transfer of property would occur even if the railroad owned the right-of-way in fee. The railroad would then have to sue, after the fact, to recover its right-of-way. Id. at 1160.

The Seventh Circuit held that the statute violated the Constitution because "the requirement of due process, including a pre-deprivation hearing where feasible, applies to temporary as well as to permanent deprivations." Id. at 1162. The court correctly noted that a post-deprivation action to quiet title, may drag on for years. Id. at 1160-62. Like Paul and Patricia Preseault who have been waiting almost a decade for just compensation, reversionary holders may have to endure a lengthy legal path to obtain any post-deprivation relief. See Preseault v. United States, Nos. 93-5067, 93-5068. In fact some may not receive any compensation where their deprivation of rights does not rise to the level of a constitutional taking. Due process, therefore, requires the ICC to provide reversionary holders the opportunity for a hearing prior to its decision to authorize a trail conversion.

B. *The Court's Reliance on the "Lack" of "Agency Action" Ignores the Substance of NARPO's Claim.*

The D.C. Circuit stated that "NARPO does not allege that the order under review violates any constitutional right; instead it alleges that the consequence of the ICC order is that current allegedly unconstitutional procedures will remain in place." A.8. In so doing, the court let formalism run amok. Perhaps a hypothetical would make this clear.

Assume a police department announces a rule that all officers, when inside a bank, must keep their eyes shut unless they receive specific authorization from the captain to open them. A citizens group complains that with their eyes closed,

police officers will be unable to catch criminals and seeks to change this rule. The group claims that citizens have a right to due process before they are deprived of their lives or property.

Under the D.C. Circuit's analysis, however, the group would be out of luck. Until a police officer is denied authorization to open her eyes, there has been no "police action." Citizens must wait until they are harmed by, for example, a bank robber before they would be permitted to bring a post-deprivation action. Much like the hypothetical rule, the due process injuries resulting from the ICC rules would be capable of repetition, yet evading review.

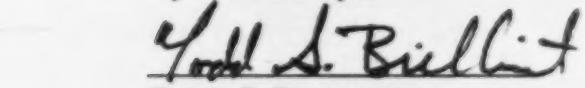
NARPO knows about the harm that can and has been inflicted upon reversionary holders. Thus, NARPO is the best, and perhaps the only, entity capable of preventing the ICC, at an early enough point, from depriving landowners of their constitutional rights.

The ICC cannot go through life with its eyes and ears closed. It cannot ignore the best information regarding a conversion, i.e., from reversionary holders, while still claiming that "there is rarely any serious issue" that a proposed trail operator meets statutory requirements. A.10 n.5.

CONCLUSION

Petitioner requests that its application for a writ of certiorari be granted because of (1) the apparent conflict between the Seventh Circuit's holding in Penn Central and the ICC's refusal to notify reversionary holders prior to rail-to-trail conversions; (2) the importance of such notice to the tens of thousands of reversionary holders in the hundreds if not thousands of pending trail proceedings; and (3) the other reasons stated above.

Respectfully submitted,
National Association of Reversionary Property Owners
By its attorneys,



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DATED: Boston, Massachusetts: January 31, 1996.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1581 **September Term, 1995**

National Association of Reversionary Property Owners,
Petitioner

v.

Interstate Commerce Commission and
the United States of America,
Respondents

On Petition for Review of an Order of the
Interstate Commerce Commission

Before: BUCKLEY, WILLIAMS and HENDERSON,
Circuit Judges.

JUDGMENT

This case was heard on the record of the Interstate Commerce Commission and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons set out in the accompanying memorandum, it is

ORDERED that the petition for review be denied.

The clerk is directed to withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:
/s/
Mark J. Langer, Clerk
[entered November 3, 1995]

National Association of Reversionary Property Owners v. ICC, et al., No. 94-1581

MEMORANDUM

The petitioner, National Association of Reversionary Property Owners (NARPO), petitions us to set aside an order of the Interstate Commerce Commission (ICC) denying a rulemaking request. NARPO argues that the ICC's decision not to initiate a rulemaking proceeding leaves in place procedures for converting railroad lines into trails that violate the reversionary interest owners' constitutional right to due process. We accord extraordinary deference to an ICC decision declining to initiate rulemaking. NARPO has not overcome this deference. Accordingly, NARPO's petition is denied.

A railroad that wants to stop operating a line of track must receive the ICC's permission either to permanently "abandon" or to temporarily "discontinue" the line.[1] 49 U.S.C. § 10903. The ICC grants permission to abandon or discontinue a line when the "present or future public convenience" permits, 49 U.S.C. § 10903, and there is no "qualified" person that wishes to operate a trail on the railroad line. 16 U.S.C. § 1247(d). If a qualified person is willing to manage the trail, take legal responsibility for the trail and pay any taxes on the trail, the ICC cannot authorize the railroad to abandon or discontinue the line. *See id.* ("the Commission . . . shall not permit abandonment or discontinuance"); *see also Rail Abandonments--Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986); *Rail Abandonments--Supplemental Trails Act Procedures*, 4 I.C.C.2d 152 (1987).

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1. A railroad "discontinues" service when it stops operating a train line. A railroad "abandons" a line when it "discontinues" service with no intention to resume service. *Mississippi Public Serv. Comm'n v. ICC*, 662 F.2d 314, 317 (5th Cir. 1981).

NARPO represents the owners of reversionary rights to railroad easements that are subject to or could be subject to trail use. Reversionary interest owners complain that the Congressional decision to prevent an abandonment and the resulting reversion if a train track can be converted to a trail takes their property without compensation. In *Preseault v. ICC*, 494 U.S. 1, 17 (1990), the Supreme Court held that a fifth amendment takings clause challenge to this Congressional decision was premature because the reversionary interest owner had not sought compensation, under the Tucker Act, in federal court. *See also Preseault and 985 Associates Ltd. v. United States*, No. 66 F.3d 1167 (Fed. Cir. 1995) (denying compensation for trail conversion to Presault and other reversionary interest owners because reversionary interest owners purchased their interest in land subject to ICC's approval of abandonment or discontinuance). In 1988, the ICC granted NARPO's petition to reconsider the regulations implementing the Trails Act. *Rail Abandonments--Use of Rights-of-Way as Trails--Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13) (May 23, 1988). The ICC declined to modify the regulations. *Rail Abandonments--Use of Rights-of-Way as Trails--Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13) (May 18, 1989).

The ICC uses a three-stage process for railroad abandonment. A railroad must first file an application with the ICC and notify certain people of the planned abandonment or discontinuance so that the ICC can assess whether the public "convenience" supports the railroad's proposed change. 49 U.S.C. § 10903-4. The application must state whether the land on which the railroad runs is suitable for public recreational use. 49 C.F.R. § 1152.22(5). The railroad must mail notification of the proposed abandonment to certain government offices, organizations and "significant users." 49 C.F.R. § 1152.20(a). In addition, the

railroad must post a notice in each train station on the line to be abandoned and place a notice as an advertisement in local newspapers. *Id.* The notice must inform the public of its right to submit to the ICC comments on whether the land is suitable for "other public purposes." 49 C.F.R. § 1152.21. After the filing and notification, the ICC decides whether the "present or future public convenience and necessity permit" the railroad to abandon the line. 49 U.S.C. § 10903-4.

Even though the "public convenience" may permit an abandonment, Congress has forbidden the ICC to approve an abandonment if the Trails Act applies. 16 U.S.C. § 1247(d). For the "applicability" stage, the ICC publishes a notice of abandonment in the Federal Register. 49 C.F.R. § 1152.27(b); *Rail Abandonments*, 4 I.C.C.2d at 155. A person or organization that wants to operate a trail on the line must file a map of the area it wishers to operate in and agree to assume financial responsibility for the area. 49 C.F.R. § 1152.29(a). After receiving applications from potential trail operators, the ICC "will determine whether the Trails Act is applicable." 49 C.F.R. § 1152.29(b)(1)(i). The ICC may find that the Trails Act does not apply only if the trail operator files a non-conforming application (e.g., one that does not include a statement accepting legal liability). 49 C.F.R. § 1152.29(b)(1)(ii)(A) (referring to compliance with § 1152.29(a)).

Once the ICC determines that the public interest permits the abandonment but that the Trails Act applies, the ICC determines whether the railroad intends to negotiate a trail agreement. 49 C.F.R. § 1152.29(b)(1)(ii)(B). If the railroad does not, the ICC issues a certificate of abandonment. *Id.* If a railroad indicates its intent to negotiate a trail agreement, the ICC issues a Certificate of

Interim Trail Use or Abandonment (CITU).[2] 49 C.F.R. § 1152.99(c). The railroad then selects a potential trail operator and starts to negotiate. 49 C.F.R. § 1152.29(b)(5). If no agreement is reached within 180 days, the CITU becomes a certificate of abandonment. 49 C.F.R. § 1152.99(c). If, however, the parties reach an agreement, the CITU authorizes the trail conversion and prevents abandonment. *Id.*

On March 29, 1994 NARPO petitioned the ICC to change the procedure to convert a railroad line to a trail. NARPO asked the ICC to modify its procedural rules to require either the railroad or the trail operator to "provide actual notice to the owners of reversionary interests in rights-of-way before [the ICC] approves conversion of those rights-of-way to trail use." (*Petition for Rulemaking Concerning the Rails-to Trails Program*, March 25, 1994.) The ICC denied the petition July 27, 1994. *Rail Abandonments--Use of Rights-of-Way as Trails--Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13). NARPO now seeks to have the ICC's July 27, 1994 decision set aside. The Rails to Trails Conservancy (RTC) and the Association of American Railroads (AAR) have intervened to support the ICC's current procedure.

NARPO asks us to review the ICC's decision not to initiate rulemaking.[3] As we have often remarked, an agency

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2. The procedure and terminology are a little different if the railroad seeks the ICC's approval to cease operating a line that in fact has not been in use for some time. This "abandonment exemption" proceeding culminates in a NITU (Notice of Interim Trail Use of Abandonment) rather than a CITU. A NITU notice must include a notification to the public that it can request trail use. 49 C.F.R. § 1105.12 App.

3. NARPO's petition would perhaps be more correctly described as a petition to reopen rather than to initiate rulemaking. First, the pre-conversion notice requested here differs little from the post-conversion notice requested in 1988. *See Rail Abandonments--Use of Rights-of-Way*

decision not to initiate rulemaking is accorded "extraordinary deference." *Capital Network Sys., Inc. v. FCC*, 3 F.3d 1526, 1533 (D.C. Cir. 1993). Our review of "agency refusals to initiate rulemaking proceedings" is so circumscribed that it is "'akin to non-reviewability.'" *Id.* at 1530 (quoting *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992)). Only in a "'rare and compelling case'" will we overturn the ICC's refusal to initiate rulemaking. *See Timpinaro v. SEC*, 2 F.3d 453, 461 (D.C. Cir. 1993).

NARPO attempts to avoid the customary standard of review by stressing the constitutional basis of its claim, invoking instead the "contrary to constitutional right" provision of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(B). NARPO argues that the failure of the current trail conversion procedure to require actual pre-conversion notice to reversionary interest owners violates the due process balance defined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).[4] It is not necessary for us to decide whether

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as Trails--Supplemental Trails Act Procedures, Ex Parte No. 274 (Sub-No. 13) (Feb. 13, 1990). Second, and more telling, NARPO asserts jurisdiction based on 28 U.S.C. § 2321 ("enjoin ... an order") rather than on 49 U.S.C. § 10326(b) ("begin a proceeding"). Under *ICC v. Locomotive Eng'rs*, 482 U.S. 270 (1987), we cannot review an ICC denial of a petition to reopen rulemaking that complains only of legal error. The ICC, however, agrees with NARPO that NARPO's 1994 petition requested a new rulemaking proceeding. We therefore likewise construe NARPO's request.

4. Both the ICC and NARPO refer to the following passage: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would

NARPO's constitutional argument alters our standard of review because we do not reach NARPO's constitutional claim. First, both NARPO and its members have other methods of challenging the constitutionality of the ICC's actions. Individual reversionary interest owners can seek review of constitutional claims after an ICC order approves a trail conversion. *See* 28 U.S.C. § 2342; 28 U.S.C. § 2321. Similarly, NARPO could have timely sought our review of the ICC's trail conversion procedure after the ICC completed its rulemaking in 1990. Second, NARPO does not allege that the order under review violates any constitutional right; instead it alleges that the consequence of the ICC order is that current allegedly unconstitutional procedures will remain in place. Because it is not the "agency action" under review that NARPO alleges violates its constitutional rights, the constitutional aspect of NARPO's claim does not alter our deferential standard of review.

The ICC refused to grant the petition to initiate rulemaking because it had previously considered similar arguments raised by NARPO. In the 1989 rulemaking proceeding, NARPO argued that reversionary interest owners should receive actual notice of the proposed trail conversion. The ICC rejected NARPO's plea over the dissent of one commissioner who was concerned that "a reversionary owner could suddenly discover that decisions affecting vital ownership interest were finalized before the owner could attempt to show that statutory criteria were not met." *Rail Abandonments--Use of Rights-of-Way as Trails--Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13) (May 18, 1989).

The ICC gave three additional reasons for not requiring that reversionary interest owners receive actual

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entail." *Mathews*, 424 U.S. at 335.

notice before a trail conversion is authorized. First, the ICC believes that reversionary interest owners are already on notice of a proposed trail conversion because the ICC's procedures require publication of a notice of abandonment in both the Federal Register and in local newspapers where the line is located. 49 C.F.R. § 1152.27(b); 49 C.F.R. § 1152.20(a). The ICC also emphasizes that local publicity generated by a proposed trial conversion notifies reversionary interest owners. Second, the agency maintains that even a reversionary interest owner who does not know about a proposed trail conversion would have little to gain from actual notice because of the minimal role the landowner can play in the conversion decision. *See Rail Abandonments*, 4 I.C.C.2d at 156. Indeed, the ICC describes its own role as "ministerial." *Id.; see Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990). Third, the ICC claims actual notice is expensive.

NARPO first argues that the earlier rulemaking is irrelevant. According to NARPO, the 1989 rulemaking involved a request for notification after the conversion was approved. Here, NARPO asks for notification *before* the ICC's applicability finding. NARPO argues that the difference in the timing of the requested notice makes this petition significantly different from its earlier one.

Regarding the ICC's three additional arguments for not requiring actual notice to reversionary interest owners, NARPO asserts, without supporting statistics, that many reversionary interest owners do not know of the trial conversion proceedings and that notifying reversionary interest owners would improve compliance with the statute. Because both the trail operator and the railroad have incentives to enter a trail conversion agreement, NARPO argues, neither organization is likely to inform the ICC of

certain matters.[5] NARPO also claims that actual notice could be inexpensively implemented by "hir[ing] a high school student with a bicycle to ride down the line placing a notice in each landowner's mailbox." (Pet. Reply Br. at 7.)

We are not persuaded by NARPO's arguments; it has not demonstrated that this is the "rare and compelling case" that warrants reversing the ICC's decision not to initiate rulemaking. In its 1989 proceeding, the ICC considered the fact that reversionary interest owners may not be aware of the conversion until after the applicability hearing and decided not to require pre-hearing notice. Even were we to accept, which we do not, NARPO's contention that the ICC did not consider pre-hearing notice at the 1989 proceeding, factors such as the number of reversionary interest owners already on notice and the cost of requiring actual notice would not differ depending on the timing of the notice.[6] The ICC has not acted arbitrarily in declining to revisit the issue.

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5. For example, NARPO argues that a trail covering only a small section of a lengthy rail corridor may not be "subject to restoration or reconstruction for railroad purposes," 16 U.S.C. § 1247(d), because there is no use for "a railway beginning and ending in the middle of nowhere." (Pet'r Br. at 29.) NARPO suggests that only its members have an incentive to inform the ICC that a proposed trail may not satisfy the statutory requirements. In response, the ICC claims that "there is rarely any serious issue" that the trail proposal meets the requirements. *See Rail Abandonments*, 4 I.C.C.2d at 156.

6. Nonetheless, we doubt that Federal Register notice alone would support the ICC's conclusion that most reversionary interest owners are thereby on notice. *Cf. Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984).

NEW ENGLAND LEGAL FOUNDATION

March 25, 1994

Mr. Sidney Strickland
Secretary
Interstate Commerce Commission
Washington, DC 20423

Re: Petition for Rulemaking
Concerning the
Rails-to-Trails Program,
16 U.S.C. §1247(d)

Dear Mr. Strickland:

I represent the National Association of Reversionary Property Owners (NARPO), a group which is concerned that the Interstate Commerce Commission's current procedures relating to conversions of abandoned railroad rights of way to recreational trail use under the Rails-to-Trails provision of the National Trails Act, 16 U.S.C. §1247(d), (Exh. A attached hereto) deprives their members and others of their constitutional rights to due process. NARPO hereby petitions the ICC to modify its procedural rules, 49 C.F.R. §1152.29 (attached as Exh. B), to require railroads and/or would-be trial operators to mail notice to the owners of reversionary interests in the rights-of-way before the rights-of-way are converted from rail to trail use. Reversionary owners should also be given an opportunity to be heard before the ICC authorizes any trail conversion which could adversely affect their property interests.

JURISDICTION

Sec. 1247(d) specifically gives jurisdiction over trails conversions to the ICC. The ICC has acknowledged this jurisdictional grant in writing its regulations for the trail conversion program. *See* 49 C.F.R. §1152.29(a). The United States Supreme Court has recognized that the ICC's jurisdiction is exclusive. *See Preseault v. ICC*, 494 U.S. 1, 7-9 (1991).

INTERESTS OF THE PETITIONERS

The National Association of Reversionary Property Owners represents over 100 property owners who own reversionary rights to railroad easements that are subject to or could be subjected to trail use in accord with §1247(d) and 49 C.F.R. §1152.29.

During the nineteenth century when the railroads were expanding across America, they often acquired their rights of way in the legal form of easements for railroad purposes. Under state common law, when a railroad easement ceases to be used for railroad service, it terminates and the owner of the underlying fee -- the reversionary owner -- obtains exclusive use, possession and control. As the ICC has noted, "[r]ailroads often do not own the land underneath their track and under some state laws a railroad easement automatically expires, and the land reverts to the original landowner [or his successor] if it is no longer used for rail service." Rail Abandonments--Use of Rights-of-Way as Trails--Supplemental Trails Act Procedures, Ex Parte No. 274 (Sub-No 13)- Feb. 13, 1989 decision, n. 1. *Accord, National Wildlife Federation v. ICC*, 850 F.2d 694, 702-04 (D.C. Cir. 1988); *Penn Central Corp. v. U.S. Vest Corp.*, 955 F.2d 1158, 1159 (7th Cir. 1992).

However, the Rails-to-Trails law, §1247(d) blocks

reversions by preserving the ICC's exclusive jurisdiction and preempting state law. The result is that the reversion is prevented or indefinitely postponed while the land is opened to the general public as a recreational trail. The reversionary owner is relegated to waiting for some hypothetical future day when no one will want to walk, cycle or skate across his land and the town or state is willing to hand over to him what for practical purposes is a long, thin public park.

Consistent with the ICC's current regulations, NARPO's members were not sent prior written notification of the proposed trail conversions on their land. Under the current rules, the ICC issues a "certificate of interim trail use" (CITU) or "notice of interim trail use" (NITU) under 49 C.F.R. §1152.29 authorizing a railroad to negotiate a trail conversion with a would-be trail operator. The negotiations are private and give the reversionary owners no opportunity to assert their rights. Indeed, the entire affair is so private that the ICC itself is not even told if the negotiations succeeded in producing a trail agreement. The first news that a reversionary owner may get of a trail may be the appearance of strangers wandering across his land.

As a result of the ICC's current regulatory scheme, reversionary owners such as NARPO's members have been unable to effectively represent their interests before the ICC authorized the conversions. NARPO's members are also concerned that they and other reversionary interest owners around the country may suffer deprivations of their property rights in future trail conversions.

ICC has rejected a previous petition by NARPO that requested that ICC amend its rules to require notice to reversionary owners *after* a conversion was approved and whenever trail use terminates. *Rail Abandonments--Use of Rights-of-Way as Trails--Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No 13), decisions of May 18, 1989 and February 13, 1990. However, NARPO now seeks *prior*

notification before the ICC authorizes trail conversion. As discussed below, recent judicial decisions make such an amendment to ~~the rules~~ appropriate.

STATEMENT OF THE CLAIM

Present ICC Regulations

Under present ICC regulations, reversionary owners are not specifically notified of the possible adverse effect a conversion may have on their property rights. The ICC requires the railroad to run an advertisement in a local newspaper announcing the proposed abandonment of the railroad line. The right-of-way is described in terms of railroad mileposts. Copies of the notice are also posted in the railroad stations on the line to be abandoned. At the end of the lengthy notice is a line inviting comments on, among other things, "prospective use of the right of way for interim trail use and railbanking" 49 C.F.R. § 1152.21; 49 C.F.R. § 1105.12. If the ICC approves the abandonment it publishes a notice in the Federal Register which typically invites applications for possible trail use. 49 C.F.R. § 1152.27(b).

The Property Interests of Reversionary Owners

Both the United States Supreme Court and the Court of Federal Claims have recognized that reversionary interests are property rights protected by the Fifth Amendment of the United States Constitution. In *Preseault v. ICC*, 494 U.S. at 16 (1990), the United States Supreme Court noted that at least "some trail conversions will amount to takings." As Justice O'Connor noted in her concurrence, "[t]he Commission's action may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the

vesting of those property rights." *Id.* at 22. The Supreme Court upheld the constitutionality of §1247(d) but ruled that a reversionary interest owner could seek compensation for the taking of his property by suing the United States in the Claims Court. The Supreme Court did not decide under what circumstances applications of §1247(d) would constitute takings. In *Preseault v. U.S.*, 27 Fed. Cl. 69, 86-87 (1992), the Court of Federal Claims specifically noted that reversionary interests are constitutionally protected property rights:

> Plaintiffs in this case took title in fee simple. Their titles were subject to easements. A reversionary interest was the specific property interest alleged to have been taken by postponement . . . when the ICC rejected the [plaintiffs'] petition for a certificate of abandonment and approved discontinuance subject to lease of the right-of-way for interim trail use. A reversionary interest constitutes property within the meaning of the fifth amendment. *National Wildlife Federation v. ICC*, 850 F.2d 694, 704 (D.C. Cir. 1988).

Accord, Preseault v. U.S. 24 Cl. Ct. 818, 831.

The ICC itself has acknowledged that a fee interest in a railroad right of way is a property interest protected by the Fifth Amendment, at least when that fee is owned by a railroad. The ICC has consistently taken the position that it cannot force a railroad that owns a right-of-way in fee to convert that right-of-way to trail use because such forced conversion would be a taking requiring payment of just compensation. When the ICC wrote its regulations implementing §1247(d), it specifically declined to force railroads to enter into trail agreements or to convert rights-of-way they own in fee to trails because ICC believed such

government coercion would require the U.S. to compensate the railroads for taking their property and §1247(d) did not empower the ICC to take railroad property. *Rail Abandonments -- Use of Rights-of-Way as Trails*, 2 ICC 2d 591, 596-598 (1986). *Accord*, Ex Parte No 274 (Sub. 13) May 18, 1989 decision p. 4-5. ICC has consistently held this position for at least twenty years, *Burlington Northern Inc. -- Abandonment Between Fremont and Kenmore, King County, Wash.* 342 ICC 446, 453 (1972), and reaffirmed its stance in a later rule-making proceeding, *Rail Abandonments -- Use of Rights-of-Way as Trails -- Supplemental Trails Act Procedures*, 4 ICC 2d 152, 153-154 (1987). The D.C., Second and Ninth Circuits have upheld the ICC against challenges to its interpretation of its authority. *National Wildlife Federation v ICC*, 850 F.2d 694 (D.C. Cir. 1988). *See Conn. Trust for Historic Preservation v. ICC*, 841 F.2d 479, 482-83 (2d Cir. 1988); *Wash. State Dept. of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987). The D.C. Circuit pointed out that the ICC's solicitude for the property rights of railroads was "in considerable tension with" its unconcern for the property rights of reversionary interest holders. *Id.* at 707 n.19. The Fifth Amendment provides no more rights to railroads than it does to individual citizens.

The ICC's regulations also provide that if a railroad voluntarily agrees to an interim trail conversion and the trail operator subsequently decides to cease trail operations, the trail operator must notify the ICC which in turn will notify the "abandonment applicant" and the "owner of the right-of-way." 49 C.F.R. §§ 1152.29(c)(2)(i) and(ii); 1152.29(d)(2)(i) and (ii). If notification to the fee owner is appropriate when the owner is a railroad, such notification is equally appropriate when the owner is an individual citizen.

Effect of Trail Conversion on the Property Interests of Reversionary Owners

A trail conversion in lieu of an abandonment will either delay or permanently deprive a reversionary owner of his right to exclusive use and occupation of the right of way. Indeed, the ICC has been forthright in declaring that frustrating the interests of reversionary owners is the purpose of §1247(d). When it promulgated regulations under the 1983 Trails Act Amendments, the ICC explained that:

> . . . the main purpose of the amendment is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreation use when the rights-of-way have been operated under easements for railroad purposes.
>
> . . .
>
> Section 1247(d) preempts State laws that would otherwise result in extinguishment of easements for railroad purposes and reversion of rights-of-way to abutting landowners.
>
> . . .
>
> . . . preemption, the key feature of the amendment, applies only to rights-of-way held and operated under easements, or subject to rights of reversion.
>
> . . .
>
> This language, and its legislative history, express congressional intent to preempt State property law that might otherwise require a reversion of rights-of-way upon the discontinuance of rail operation, as occurred in *Pollnow [v. State Dept. of Natural Resources*, 276 N.W. 2d 738 (Wis. 1979)] and *Schnabel [v. County of DuPage.*, 428 N.E. 2d 671 (Ill. 1981)], *supra.*

Rail Abandonments--Use of Rights-of-Way as Trails, 2 ICC

2d 591, 596, 597, 599, 600 (1986); the rules are codified at 49 C.F.R. §1152.29. The ICC advised carriers and would-be trail operators to use the procedure under §1247(d) only if the right-of-way was an easement subject to reversion; preventing the fee owner from getting his land back was precisely the point of the statute and regulations. 2 ICC 2d at 599.

The Claims Court has agreed with ICC, noting in *Preseault* that "it is undisputed that the sole purpose in enacting section 1247(d) was to frustrate the reversionary interest of owners of the fee underlying railroad easements, which interest would become present possessory the instant the ICC certified abandonment under the 4-R Act." 27 Fed. Cl. at 90.

The ICC has suggested in the past that trail conversion might increase the value of the surrounding property, at least as compared to ongoing railroad service. However, the alternatives are not actual rail use versus trail use. As the Supreme Court noted, "trail conversion is permitted only *after* the Commission determines that rail service will not be needed in the foreseeable future." *Preseault*, 494 U.S. at 18 (emphasis in original) citing *Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures*, 54 Fed. Reg. 8011, 8012 n.3 (1989) ("[i]n every Trails Act case, we will already have found that the public convenience and necessity permit abandonment.") *Accord, Trails Rules*, 2 ICC 2d at 609. *See* 49 U.S.C. §§ 10903, 10505(a)(1). In most instances of trail conversion actual rail service has long since ceased. For instance, in the *Preseault* case, no train service had run across the Preseaults' property for approximately fifteen years before trail conversion was requested. Therefore, the alternatives are either trail use or the ICC's approval of abandonment of the service obligation. The latter will generally entail abandonment of ICC jurisdiction and abandonment of the easement itself, thus returning the land to the reversionary owner. For obvious

reasons, reversionary owners are likely to prefer reversion to trail use.

Moreover, while some owners may like hosting recreational trails, many others find them intrusive and burdensome. See the attached affidavits of J. Paul Preseault filed in the Claims Court phase of his litigation. Exh. C. Mr. Preseault has been beset by many trespassers who enter his property via the trail that runs through it and he and his family have been involved in collisions and near-collisions as they cross the trail to get to their home.

The Constitutional Right to Prior Notice and an Opportunity to Be Heard

Basic procedural due process under the Fifth Amendment guarantees rights to notice and the opportunity to be heard "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. In *Mullane* the Court held that published notice of an action to settle the accounts of a common trust fund was insufficient to inform beneficiaries of the trust whose names and addresses were known to the trustee. The Court emphasized that, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such that one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

In more recent cases the Supreme Court has reaffirmed and developed the principles announced in *Mullane*. In *Mennonite Bd. of Missions v. Adams*, 462 US 791 (1983), the Court held that publication and posting are inadequate notice to mortgagees of tax sales. The Court

noted that the mortgagee's lien is a property interest under state law and that the tax sale diminishes and then extinguishes the value of the mortgagee's property. Therefore, the Court said,

> [A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. . . . Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable.

Id. at 799-800. In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 488-91 (1988), the Court said that it was not necessary for a proceeding to directly adjudicate the merits of a claim in order to "adversely affect" that interest and so require notice by service or mail to all potential claimants who are reasonably ascertainable. In *Connecticut v. Doehr*, 501 U.S. ---, 115 L. Ed. 2d 1 (1991), the Supreme Court held that an ex parte prejudgment attachment of realty without a bond and absent exigent circumstances violates due process even if the attachment was only temporary and even though it left the property owner in possession. Similarly, in *Greene v. Lindsey*, 456 US 444 (1982), personal service or service by mail, rather than posting summons on a tenant's door, was held to be required in a forcible entry and detainer action. Even a person who has been convicted of drug dealing is entitled to notice and a hearing before his house can be seized as property used in drug trafficking. *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993).

The Seventh Circuit has applied this line of Supreme Court decisions to the context of reversions of railroad

easements in *Penn Central Corp. v. U.S. Railroad Vest. Corp.*, 955 F. 2d 1158 (7th Cir. 1992). In that case Indiana enacted a statute providing that whenever the ICC abandoned its jurisdiction over a right-of-way then the right-of-way itself would be deemed to have been abandoned under state law; the right-of-way would automatically go to the abutting owner, even if the railroad had a bona fide claim to own the right-of-way in fee. The abutting owner only had to file an affidavit claiming the property and record the affidavit to establish record title. *Id* at 1160. The Seventh Circuit struck down the statute because it could deprive railroads of fee interests (if they held any) without prior notice and hearing.

> The rule is that a state cannot take a person's property without giving him an opportunity for a hearing *in advance of the taking*, unless there is a good reason -- an emergency, for example, or the sheer infeasibility of a pre-deprivation hearing, or the demonstrable adequacy of post-deprivation process -- for dispensing with the requirement of a predeprivation hearing.

Id. at 1161 (emphasis in original). The court held that the statute was not saved by the availability of a post-deprivation hearing in a quiet title action because such a suit would likely drag on for months or years after the alleged deprivation. *Id.* at 1161-62. Nor did it matter that most of Penn Central's real estate interests really were easements. It was still entitled to an opportunity to make its case as to the property rights that did survive abandonment *before* those rights were extinguished. *Id.* at 1163.

Just as railroads like Penn Central are entitled to prior notice and hearing before they are deprived, even temporarily, of their fee interests in rights-of-way, so too reversionary owners are entitled to the same constitutional right. Post-deprivation remedies for reversionary owners have taken

years. For instance, the ICC authorized a trail conversion of a right of way across Paul Preseaults land in 1986; eight years later he is still litigating his claim. See briefs filed by the United States and the ICC in *Preseault v. U.S.*, Fed. Cir. Nos. 93-5067 and 93-5068

NARPO is not asking the ICC to decide that all or even any trail conversions effect takings requiring compensation under the Takings Clause. Even if a trail conversion does not amount to a "taking" in the constitutional sense because it because only a temporary delay of the reversion, as the United States has argued in the pending *Preseault* litigation, reversionary interest owners are still entitled to prior notice and an opportunity to be heard under the Due Process Clause. As the Seventh Circuit held, "The requirement of due process, including a predeprivation hearing, where feasible, applies to temporary as well as to permanent deprivations." *Penn Central v. U.S. Railroad Vest* 955 F.2d at 1162, citing *Conn. v. Doehr*, 111 S. Ct. at 2113, 2115.

Issues to be Decided Regarding Trail Conversions

The constitutional right of reversionary owners to prior notice and hearing cannot be dismissed on the theory that the reversionary owners would have nothing to say because the proceeding is purely pro forma. Reversionary owners are likely to have statutory issues to raise before the ICC and constitutional issues to be raised in federal court.

We are aware that the ICC takes the position that its role in trail conversions is merely "ministerial." Ex Parte No. 274 Sub-No 13B), *Policy Statement on Rails to Trails Conversions*, 55 Fed. Reg. 4026 (Feb. 6, 1990). However, even the determination of whether the statutory criteria of §1247(d) have been satisfied will often raise issues of fact and law upon which interested parties are entitled to be

heard. As Commissioner Andre said in his opinion dissenting in part from the Commission's May 18, 1989, ruling, "[i]n the absence of formal or actual notification that a Trails Act deal was in the making, a reversionary owner could suddenly discover that decisions affecting vital ownership interests were finalized before the owner could attempt to show that statutory criteria were not met." Ex. Parte No 274 (Sub-No. 13) at 8.

For instance, a reversionary owner may wish to challenge a would-be trail operator's ability to assume full financial responsibility and liability for the line. As the owner of the underlying fee, the reversionary owner might be held jointly and severally liable under some state laws for injuries suffered on the right-of-way if the trail operator is unable to pay the damages. Furthermore, the trail operator or persons he invites onto the property may injure the reversionary owner. Thus, the reversionary owner will often have an incentive to inquire into the trail operator's qualifications to a degree that the ICC itself declines to undertake.[7] Reversionary owners are entitled to be heard on these issues.

Moreover, even if the would-be trail operator meets all the statutory requirements, there will remain the constitutional question whether the trail conversion effects a taking for which the reversionary owner is entitled to just compensation. Of course, it is not the ICC's role to resolve

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7. Similarly, railroads typically do not have any incentive to inquire into the qualifications of a would-be trail operator when the trail will run over an easement. But for the application of §1247(d), the easement would terminate and the line would automatically revert to the landowner. Sec. 1247(d) allows the railroad to sell the right-of-way to the operator or to get favorable publicity for "giving" it over to public use. This is pure windfall profit to the railroad at the expense of the reversionary owner. Furthermore, the railroad avoids the costs of removing railroad equipment that it would otherwise have to pay.

whether or not a particular trail conversion would work a taking of a reversionary interest. That is a job for the Court of Federal Claims, the Court of Appeals for the Federal Circuit, and, ultimately, the Supreme Court. *See Preseault v. ICC*, 494 U.S. at 17. Nonetheless, if the ICC is going to authorize actions that might deprive some persons of property rights, then it is constitutionally obliged to see that all potential claimants who can reasoably be ascertained get prior notice of the action so that they can promptly bring their claims in the appropriate forum.

Requiring Notice by Mail is Reasonable Under the Circumstances

In light of recent judicial decisions, it is no longer sufficient for the ICC to refuse to require notice by mail because such notice "would be a time-consuming, expensive and burdensome task," as the Commission said at p. 6 of its May 18, 1989, decision rejecting a prior NARPO petition. Ex Parte No. 274 (Sub-No. 13). Although notice by mail would involve increased expense to the trial operator and/or railroad, it is constitutionally required. The purpose of the Bill of Rights is not to make public administration easy but to guarantee the individual rights of American citizens.

A railroad abandoning a right-of-way would have records of who owns the reversionary interests or would at least have records from which ownership could be determined. For instance, a comparison of the railroad's records of the right-of-way with the maps in the county land records office would show the current owners of the abutting parcels; these would generally be the owners of the reversionary interests. Under these circumstances, publication of notices as called for by the ICC rules is constitutionally

inadequate. As the Supreme Court said in *Mullane*, 339 U.S. at 315: -

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract . . . . In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.

The likelihood that a typical farmer or homeowner would see the notices published in either the Federal Register or the local newspaper and realize their significance to his property interests is remote. Neither notice effectively notifies owners of reversionary interests that their rights may be taken. Rather, the notices are invitations to potential trail operators, not a notice warning reversionary owners that their property interests may be adversely affected. The typical reversionary interest owner does not read the Federal Register. The notice in the local newspaper is practically incomprehensible to anyone who is not skilled in railroad law and has a detailed map of the line ready to hand.[8] As in *Mennonite*, *supra*, the

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8. Sec. 1105.12 provides a standard form for newspaper notices, which states in relevant part:

> (Name of railroad) gives notice that on or about (insert date petition for abandonment exemption will be filed with the Interstate Commerce Commission) it intends to file with the Interstate Commerce Commission, Washington DC 20423, a petition for exemption under 49 U.S.C. 10505 from the prior

constitutional obligation of notice is not negated by the possibility that some owners might be sophisticated enough to take special measures to protect their property interests or might simply be lucky enough to hear about the conversion.

Service by mail would be reasonable in these circumstances. The issue will be very important to many reversionary owners who face the prospect of waiting decades or even lifetimes for the return of their land, while hosting hordes of strangers crossing their property. Service by mail is feasible. The ICC already requires railroads seeking abandonment to mail notice to thirteen separate classes of persons, including all "significant users" of the line. 49 C.F.R. §1152.20(a)(2). Both railroads and would-be trail operators must provide detailed maps of the right-of-way that would be converted to trail use. 49 C.F.R. §§ 1152.13. 1152.29(a)(1). The railroad or prospective trail operator need only compare this map with the maps and records in the county registry of deeds to ascertain the names and addresses of the abutting owners who may have reversionary interests. In addition, the railroad will have records of the original transactions by which it acquired either fee interests or easements.

NARPO takes no position as to whether the ICC

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approval requirements of 49 U.S.C. §10903, et seq., permitting the (abandonment of or discontinuance of service on) a _____ mile line of railroad between railroad milepost _____, near (station name), and railroad milepost _____, near (station name) in _____ County(ies), (State). The proceeding has been docketed as No. AB _____ (Sub-No. _____ X). . . . Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to SEE, Interstate Commerce Commission, Washington, DC 20423 or by calling SEE at 202-275-7684. . . . . Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Commission.

should impose the obligation of notice on the railroad or the prospective trail operator. While the railroad would have the most detailed records, the would-be operator is typically a state or local government which is seeking to obtain a valuable recreational facility at minimal cost. The cost of searching property records and mailing out notices would be trivial compared to the costs that the operator would incur if it had to buy a right-of-way for a recreational trail in a series of arms-length transactions with landowners.

In any event, the line of Supreme Court due process decisions going back to *Mullane* requires the ICC to direct railroads and/or would-be trail operators to notify reversionary owners by personal service or by mail before they can be deprived of the use of their property even temporarily by an "interim" trail.

REQUEST FOR RELIEF

For the reasons stated above, the National Association of Reversionary Property Owners respectfully requests that the ICC amend its rules, 49 C.F.R. § 1152.29, relating to rails-to-trails conversions under 16 U.S.C. §1247(d). ICC should require that whenever a prospective trail operator files an application seeking a trail conversion, that operator, or the railroad abandoning the right-of-way must notify by mail or personal service all abutting owners who may claim to own reversionary interests in the right-of-way. In clear and simple language the notice ought to describe the right-of-way and inform the owners that their property interests may be affected by the proposed conversion. The notice should tell the owners how and where they can submit their comments concerning the conversion to the ICC. It should also inform them that they may have a claim against the United States if the conversion occurs.

As called for by 49 C.F.R. §1110(c), I enclose fourteen additional copies of this petition for rulemaking. Thank you for your consideration of this matter. If there is any further information which I can provide to assist the ICC in considering this request, please do not hesitate to ask.

Sincerely,
/s/
Patrick W. Hanifin
Staff Attorney

PWH:tim
Enclosures

INTERSTATE COMMERCE COMMISSION
DECISION
Ex Parte No. 274 (Sub-No. 13)

RAIL ABANDONMENTS--USE OF RIGHTS-OF-WAY
AS TRAILS--SUPPLEMENTAL
TRAILS ACT PROCEDURES
Decided: July 27, 1994

By petition filed March 29, 1994, the National Association of Reversionary Property Owners (NARPO) seeks a rulemaking in order to amend the Commission's procedural rules concerning the Rails-to-Trails Program, 16 U.S.C. 1247(d). NARPO requests that the Commission amend 49 CFR 1152.29 to: (1) require a prospective trail operator to notify by mail or personal service all abutting landowners who may claim to own reversionary interests in the subject right-of-way; (2) require such notice to describe plainly the right-of-way and inform potential reversionary landowners that their property interests may be affected and that they may have a takings claim against the United States; and (3) allow reversionary landowners an opportunity to comment or protest the trail use request.

We have previously addressed similar arguments and concerns raised by NARPO. In a decision served February 21, 1990, upon reconsideration of a decision served May 26, 1989, we declined to amend our rules implementing the National Trails System Act, 16 U.S.C. 1247(d) and 49 CFR 1152.29.[1] In that decision, we found that the additional notice and reporting requirements sought by NARPO would be time-consuming, expensive, and burdensome and were not

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1. Rail Abandonments--Use of Rights-Of-Way as Trails--Supplemental Trails Act Procedures, Ex Parte No. 274 (Sub-No. 13) (ICC served Feb. 21, 1990) (February, 21 1990 decision).

warranted given the Commission's limited involvement in trail use proposals and the purpose of the Trails Act, which is to encourage and facilitate interim trail use.[2]

NARPO has not shown a need for changes in our procedures at this time. As we explained in the February 21, 1990 decision, interested persons are put on notice about abandonments. Notice of every abandonment proposal is published in the Federal Register and local newspapers. Contrary to NARPO's claims, any interested party may learn about and participate in our proceedings prior to any trail use. Additional notice has not been shown to be required to protect the right of landowners to bring a takings claim.

Moreover, as we have said on numerous occasions, our implementation of the Trails Act is merely ministerial: we issue a certificate or notice permitting parties to negotiate a Trails Act agreement in cases were the trail use proponent files a formal statement (indicating its willingness to assume full financial responsibility and liability for the line and to agree to a rail banking condition for potential future reactivation of rail service) and the railroad indicates its willingness to negotiate.[3] Although compensation may be available to reversionary interest holders in certain instances, we do not attempt to determine when a compensable taking occurs.[4] Under the Tucker Act, 28 U.S.C. 1491, the United States Claims Court is the proper forum to resolve landowners' takings claims. Therefore, even in the unlikely event that a landowner was not aware of an abandonment before it was approved, the landowner still would be able to

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2. Id. at 1-2.

3. February 21, 1990 decision at 2-3.

4. Rail Abandonments-Trails Act Policy Statement, 5 I.C.C.2d 370 (1989).

exercise its right to seek compensation in the claims court under the Tucker Act, which has a 6 year statute of limitations.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for rulemaking filed March 29, 1994, by the National Association of Reversionary Property Owners is denied.

2. This decision is effective on its service date.

By the Commission, Chairman McDonald, Vice Chairman Phillips, and Commissioners Simmons and Morgan.

Anne K. Quinlan
Acting Secretary

[Late Release -- Service Date July 28, 1994]

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. _____

NATIONAL ASSOCIATION OF
REVERSIONARY PROPERTY OWNERS,

Petitioner,

v.

The INTERSTATE COMMERCE
COMMISSION and the
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW

1. The National Association of Reversionary Property Owners hereby petitions this Court for review of the Order of the Interstate Commerce Commission entered on July 27, 1994.

2. Petitioner National Association of Reversionary Property Owners (NARPO) is an unincorporated association with its principal place of business in Issaquah, Washington. Its members own reversionary interests in railroad easements which have been or may be adversely affected by conversions of abandoned railroad rights-of-way to trail use under the "Rails-to-Trails" program administered by the Respondent Interstate Commerce Commission (ICC) pursuant to 16 U.S.C. §1247(d).

3. This Court has jurisdiction over this petition under 28 U.S.C. §§ 2321 and 2342(5). Venue in this Court is

proper under 28 U.S.C. §2343.

4. On or about March 29, 1994, NARPO filed with the ICC the petition for rule-making which is attached hereto as Exh. A. The petition asked that the ICC modify its rules concerning Rails-to-Trails conversions, 49 CFR §1152.29, to require that whenever a prospective trail operator files an application seeking a trail conversion, that operator or the railroad abandoning the right-of-way must notify by mail or personal service all abutting owners who may claim to own reversionary interests in the right-of-way.

5. On July 27, 1994, the ICC denied NARPO's petition. A copy of the ICC's decision is attached hereto as Exh. B. The service date of the ICC's decision was July 28, 1994.

6. The ICC's decision and its present Rails-to-Trails rules deny NARPO's members and other persons their constitutional rights to notice and an opportunity to be heard as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

7. NARPO petitions this Court to reverse the decision of the ICC and to order the ICC to grant NARPO's petition and to grant such other and further relief as justice requires.

DATED: Boston, Massachusetts: August 18, 1994.

By its attorneys,

/s/

Patrick W. Hanifin, Esq.
Stephen S. Ostrach, Esq.
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln St.
Boston, Massachusetts 02111
(617) 695-3660

United States Court of Appeals for the Federal Circuit

93-5067,-5068

PRESEAULT v STATE OF VERMONT

O R D E R

A poll of the judges in regular active service to determine whether the appeal should be heard in banc was conducted at the suggestion of an active judge,

Upon consideration thereof, it is

ORDERED that the suggestion to rehear the appeal in banc be, and the same hereby is, accepted; and

IT IS FURTHER ORDERED that the judgment of the court entered on September 14, 1995, and reported in 66 F.3rd 1167 (Fed. Cir. 1995), is vacated and that the opinion of the court accompanying the said judgment is withdrawn.

Additional briefing and argument are not indicated at this time.

Chief Judge Archer and Circuit Judge Bryson did not participate in the poll.

FOR THE COURT,

/s/
Francis X. Gindhart
Clerk

[entered November 20, 1995]

cc: Patrick W. Hanifin
John K. Dunleavy
Jeffrey P. Kehne
William P. Pendley
Thomas C. Jackson

EC

INTERSTATE COMMERCE COMMISSION
DECISION

Docket No. AB-3 (Sub-No. 63)

MISSOURI PACIFIC RAILROAD COMPANY--ABANDONMENT IN OKMULGEE, OKFUSKEE, HUGHES, PONTOTOC, COAL, JOHNSTON, ATOKA, AND BRYAN COUNTIES, OK

Decided: December 19, 1990

By petition filed September 14, 1990, the American Farm Bureau Federation, the Oklahoma Farm Bureau Federation, and David Roberson, a reversionary interest holder in the right-of-way (Farm Bureau or petitioners) seek reopening of this Trails Act proceeding, based on a claim of changed circumstances. On October 3, 1990, the Oklahoma Department of Tourism and Recreation (ODTR) and other trail interests[1] replied in opposition. Farm Bureau tendered a reply to respondents' reply on October 12, 1990. As explained below, we will reopen the case to afford ODTR (the trail group involved) an opportunity to show that the statutory conditions for interim trail use continue to be met.

BACKGROUND

In this case, the Commission approved the abandonment by Missouri Pacific Railroad Company (MP) of a 123.6-mile rail line between Henryetta and Durant, OK as part of the larger transaction approved in Union Pacific Corp. et al.--Cont.--MO-KS-TX R. Co. et al., 4 I.C.C.2d 409 (1988). We issued a standard (full) abandonment certificate

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1. Tulsa Bicycle Club, Oklahoma Recreation and Parks Society, Cross Timbers Rails to Trails, City of Ada, Iowa Trails Council, Oklahoma Bicycle Society, and Rails to Trails Conservancy.

for this line.

Subsequently, by letter filed June 1, 1988, MP stated that it would negotiate for an interim trail use arrangement under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Accordingly, the Director of the Commission's Office of Proceedings rescinded the abandonment certificate and in its place issued a Certificate of Interim Trail Use or Abandonment (CITU) under 49 CFR 1152.29(c), giving the parties 180 days (until December 19, 1988) to negotiate a trail use agreement.[2] The Director then granted two requests to extend the negotiating period.

Farm Bureau and the National Association of Reversionary Property Owners sought reconsideration of the extension decisions, alleging that the Commission had no authority to extend the negotiating period. The Commission denied the petitions for reconsideration, in decisions issued in January and February 1990, and further extended the negotiating period (to March 15, 1990).[3]

Petitioners then instituted a court action challenging the issuance of interim trail use authority in this case. David Roberson, et al. v. ICC et al., U.S.C.A. D.C. Cir. No. 90-

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2. The Director has been delegated the authority to issue CITUs and other decisions necessary to administer the Trails Act. 49 CFR 1011.8(c)(4) and (5).

3. The Commission has applied the Trails Act liberally, in light of Congress' direction to "encourage the development of additional trails." H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983). The Commission has accepted late-filed Trails Act requests whenever possible and extended the negotiating period (at times over landowners' objections) where the parties needed longer than the standard 6-month period provided by its rules. See Ex Parte No. 274 (Sub-No. 13B), Policy Statement on Rails to Trails Conversions (served February 5, 1990), at 13.

1182.[4]

PETITION TO REOPEN

In support of its petition to reopen, Farm Bureau claims changed circumstances and offers an August 1990 newspaper article reporting that ODTR has dropped its plans to develop a trail along this right-of-way.[5] The Farm Bureau asks that the Commission now vacate the CITU, issue a certificate of full abandonment and declare the line fully abandoned.[6]

The Commission's rules specify that if the parties fail to enter into a trail use agreement within the time provided, the railroad my fully abandon the line.[7] Here, however, ODTR and MP did enter into a trail use agreement. The rules do not address what to do where the trail group then decides not to go forward with its plans.[8] The Farm Bureau

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4. To afford the Commission time to resolve the pending administrative petition to reopen, the court has suspended briefing and is holding the court case in abeyance.

5. According to the article, the Oklahoma legislature has adopted a concurrent resolution that ODTR should "take no action to develop or promote" the right-of-way. The article states that, while the concurrent resolution is not legally binding, it sends "a signal to [the trail group] to drop the project," because ODTR "would have to go through the legislature for funding" to pursue the project.

6. If the article alone is not considered sufficient evidence upon which to declare the line abandoned, the Farm Bureau asks that the Commission institute a limited evidentiary proceeding to determine whether ODTR has in fact decided not to develop a trail.

7. 49 CFR 1152.29(c)(1).

8. The rules provide that when a trail group wishes to terminate a trail and its obligations for the right-of-way, it must come to the

argues that the interim trail use agreement should be considered null and void due to ODTR's failure to follow through with it.

ODTR opposes the Farm Bureau's petition, voicing its continued support for application of the Trails Act to this corridor. ODTR concedes that it "currently has no plans to engage in actual improvements or other development of the right-of-way for more 'advanced' kinds of recreational use, such as bicycling." But it argues that there has been no renunciation or termination of trail use here because: (1) a trail use agreement was executed; (2) nothing in the statute or rules requires a trail group to construct an "advanced" type of trail; (3) the corridor is currently suitable for a variety of trail uses, including walking, hiking, bird watching and viewing wildlife habitat, and will be made available to any local communities or groups who wish to develop it further; and (4) the corridor remains intact and available for restored rail service (i.e., rail banking).

The Farm Bureau seeks leave to file a response, proffered on October 12, in which it argues that ODTR's reply confirms that no funds will be expended to develop a trail on this right-of-way. The Farm Bureau claims that ODTR cannot fulfill its obligations under the statute, to assume liability for the trail use and responsibility for the corridor, including managing and paying real estate taxes, if there is no application of funds.

MP sent a status report concerning this corridor on December 3, 1990. The carrier supports continued application of the Trails Act to this corridor. MP states that it is its understanding that, when salvage operations are completed, the right-of-way will be available for a variety of trail uses under Section 1247(d) "through [ODTR] or possibly

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Commission and request that the CITU be vacated. 49 CFR 1152.29(c)(2).

other state or local agencies."

DISCUSSION AND CONCLUSION

It is well-settled that the Commission does not analyze, approve, or set the terms for a trail use arrangement. We require only the essential information to process Trails Act requests. When a prospective trail user states its willingness to assume financial responsibility (and the railroad agrees to it), section 1247(d) provides that "the Commission shall impose" such terms and conditions of transfer and "shall not permit abandonment." Thus, we lack the discretion to disapprove an interim trail use that has been voluntarily negotiated. Iowa Souther R. Co.--Exemption--Abandonment, 5 I.C.C.2d 496, 502-504 (1989), aff'd sub nom. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990).

Section 1247(d) imposes only two conditions on interim trail use: the rail banking requirement (that the right-of-way be subject to future reactivation of rail service), and the requirement that the trail user assume liability for the property's management and taxes.[9] As the agency that administers this section of the Trails Act, we have some obligation to ensure that the statutory conditions continue to be met. Where, as here, we are presented with reason to believe to the contrary, we must look into the matter.

The Farm Bureau has presented enough evidence to call into question the continued application of the Trails Act. If ODTR lacks funding to develop the trail (as the evidence indicates), ODTR may also not have the ability to meet the financial and liability conditions of the Trails Act. ODTR did not state, in its response, whether it can and will still assume financial responsibility and liability for the line, as

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9. We reiterate these conditions in every CITU that we issue.

the statute requires.[10]

However, we do not believe that the present record warrants revoking the CITU and declaring the line abandoned as the Farm Bureau requests. ODTR and MP have entered into a trail use agreement[11] and there is no evidence that either party wants to back out. To the contrary, ODTR has stated that it continues to support trails use here; that the corridor is currently suitable, in its present condition, for a variety of recreational uses; and that it will make all or any portion of the corridor available to local communities or agencies that wish to develop it for bicycling or other more "advanced" recreational uses. See also the December 3, 1990 status report filed by MP. Thus, we will look into this matter further.[12]

We agree with ODTR that section 1247(d) does not require the trail to be "developed" for advanced recreational uses. There can be differing types or levels of trail use, and we will not become involved in determining the type or level of trail for a particular right-of-way. Moreover, there is no time limit on how quickly a trail must be developed to its intended level of use. Thus, if ODTR's funding impediments only affect the level of trail to be developed (rather than its ability to assume responsibility for the property) or are

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10. The other statutory requirement is not at issue here, since ODTR specifically stated in its response that the corridor remains available for the resumption of rail service.

11. The Farm Bureau attempts to make much of the fact that the parties did not file a copy of their agreement with the Commission. However, we have never required the filing of parties' interim trails use agreements.

12. We emphasize that the only test for involuntary termination or revocation of a CITU is whether the statutory criteria for interim trail use continue to be satisfied.

limited to the last fiscal year, there would be no reason to cut off its rights under the Trails Act. To do so would be inconsistent with both the Commission's limited involvement in Trails Act proposals and Congress' clear intent to preserve as many rail corridors as possible under section 1247(d).[13]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Proceeding is reopened to afford ODTR the opportunity to show that the statutory requirements of the Trails Act continue to be satisfied. ODTR's statement is due 30 days from the service date of this decision, and Farm Bureau's reply is due 20 days thereafter.

2. The October 12, 1990 reply submitted for filing by Farm Bureau is accepted and made part of the record.

3. This decision is effective on January 4, 1991.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Emmett, and McDonald.

Sidney L. Strickland, Jr.
Secretary

[Service Date Jan. 4, 1991]

(SEAL)

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13. See Preseault v. ICC, 110 S.Ct. 914, 926 (1990) ("Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable").